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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1437

RICHARD P. MUCIE, D. O.,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

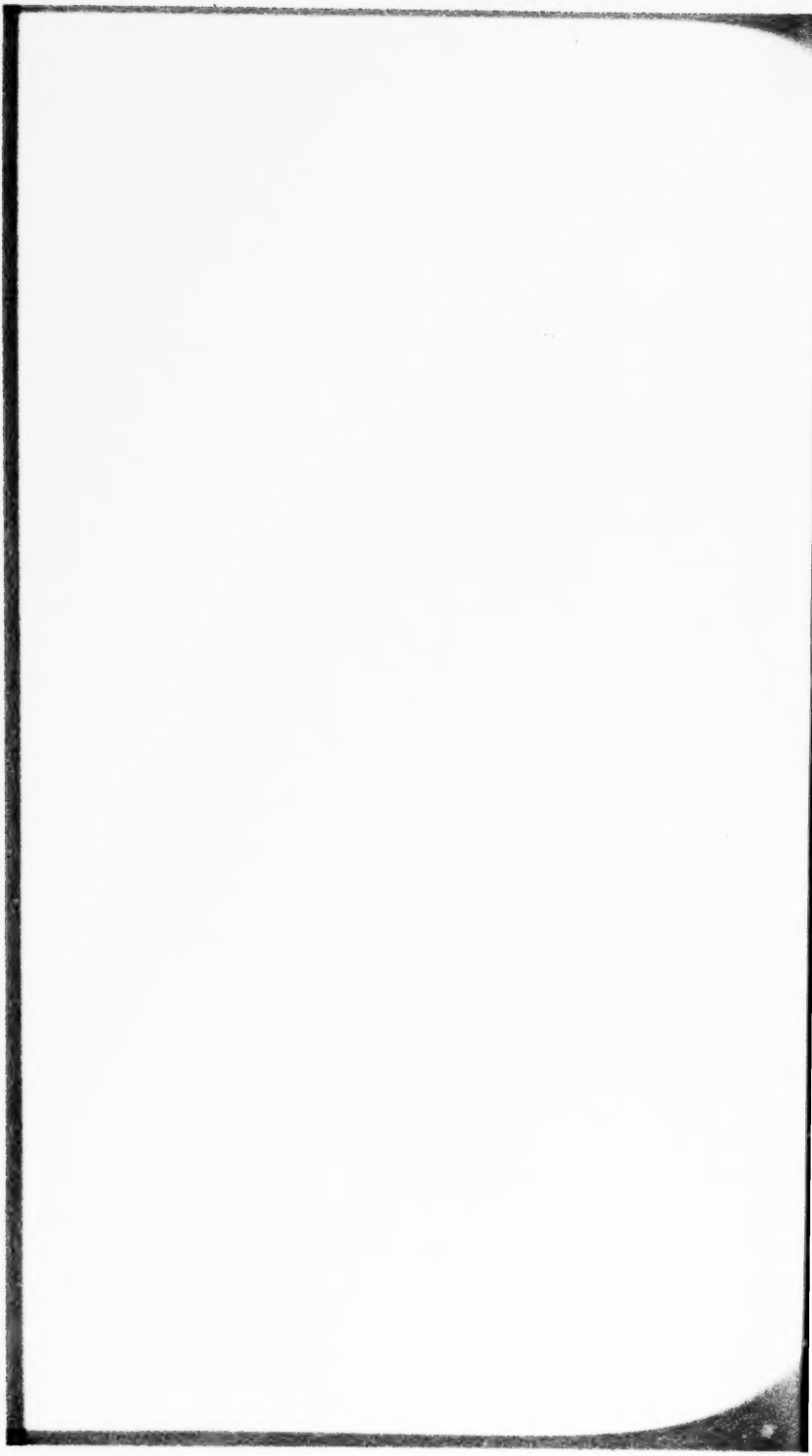
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

AND

APPLICATION FOR RECONSIDERATION OF APPLICATION FOR RELEASE ON BAIL PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Richard P. Mucie, D. O., by and through his attorneys of record, presents his Petition for Writ of Certiorari to the Supreme Court of Missouri, and states:

(a) OPINION BELOW

The opinion of the Supreme Court of Missouri, Division No. One, filed January 12, 1970, is reported as *State v. Mucie,* 448 S.W.2d 879. A copy of that opinion is set out in the Appendix hereto.

(b) GROUNDS FOR JURISDICTION

Petitioner seeks to have reviewed the decision and opinion of the Supreme Court of Missouri affirming the judgment, sentence and conviction of Petitioner of the offense of manslaughter by abortion, a felony under the laws of Missouri, dated January 12, 1970. No petition for rehearing or for transfer to the court en banc was filed for the reason that divisional opinions are final judgments and under the practice and procedure of the Supreme Court of Missouri, petitioners would not be entitled to such a rehearing or transfer as a matter of right. This petition is presented under the authority of *Section 1257, Title 28, United States Code,* and within the time prescribed by *Rules of the Supreme Court, Rule 22, Title 28, United States Code.* A certified record in the Supreme Court of Missouri has been requested.

(c) QUESTIONS PRESENTED FOR REVIEW

(1) The validity of a statute of the State of Missouri which Petitioner believes to be repugnant to the Constitution of the United States, and which Petitioner would urge violates the rights, privileges and immunities granted Petitioner under the Constitution of the United States; in that

(i) *Section 559.100, R.S.Mo., 1959,* a copy of which is set forth herein below, is without appropriate standards by which it can be determined when and under what circumstances an abortion is illegal as not being "necessary to preserve (the mother's) life or that of an unborn child," and does not and did not therefore advise the Petitioner of the nature and cause of the accusation against him in violation of the *Fifth Amendment to the United States Constitution.*

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(ii) *Section 559.100, R.S.Mo., 1959,* also provides that where anyone, including the Petitioner, shall commit or attempt to commit an abortion, "shall, in event of the death of said woman or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter." Petitioner would urge that such a provision is so vague and indefinite that it violates the due process clause of *Section 1 of the Fourteenth Amendment to the United States Constitution,* in that it does not require that the abortion or attempted abortion be the proximate cause of the death or that the death even be connected with the acts of the defendant and provides for guilt regardless of the care and skill used in the performance of the abortion.

(iii) *Section 559.100, R.S.Mo., 1959,* denies Petitioner, a licensed physician, equal protection under the law in violation of *Section 1 of the Fourteenth Amendment,* in that it establishes a double standard of guilt.

(iv) *Section 559.100, R.S.Mo., 1959,* is an unconstitutional denial of the prospective mother's constitutional right to privacy as guaranteed by the *First, Fourth, Fifth, Ninth and Fourteenth Amendments.*

(v) *Section 559.100, R.S.Mo., 1959,* infringes upon the privileges and immunities of the Petitioner, as a duly licensed physician, to exercise and perform his duties and functions to abort pregnancies when otherwise necessary for the health and well being of his patients even though it is not necessary to save the mother's life, all in violation of *Section 1 of the Fourteenth Amendment.*

(vi) *Section 559.100, R.S.Mo., 1959,* is unconstitutionally vague, indefinite, illogical and confusing in that it exempts abortions where such would be necessary to preserve the life of the unborn child, when an abortion

will of necessity prevent the birth or life of the unborn child.

(vii) *Section 559.100, R.S.Mo., 1959,* violates the *Ninth Amendment* in that the decision of whether or not to abort or otherwise terminate an unquickened fetus is the decision of the mother and not of the State, and of her right to choose whether to bear children or not.

(2) Whether or not the Supreme Court of Missouri was correct, under due process, in holding that the Petitioner did not have standing to attack the constitutionality of *Section 559.100, R.S.Mo., 1959.*

(d) CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when

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in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Ninth Amendment to the United States Constitution:

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment to the United States Constitution, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 559.100, Revised Statutes of Missouri of 1959:

Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall,

in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion.

(e) STATEMENT OF THE CASE

The Petitioner was originally convicted after a trial by jury of the felony offense of manslaughter by abortion under *Section 559.100, R.S.Mo., 1959,* and was sentenced to ten years imprisonment. Upon direct appeal, the Supreme Court of Missouri affirmed that conviction.

Petitioner was a licensed and practicing osteopathic physician in Kansas City, Missouri. Nancy Ward was a student at the University of Oklahoma and while there began to date Fred Landreth. This dating led to an engagement and this engagement eventually led to her pregnancy. When this was discovered, Nancy and Fred discussed the situation and Nancy even contemplated suicide in order to hide her shame, but finally Nancy and Fred decided to secure an abortion. They enlisted the aid of Fred's father, Ed Landreth.

It was the State's evidence that Ed called Petitioner on January 30, 1968 and told him of his son's "problem", which his son advised arose about the middle of October.

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Petitioner advised Ed that it was too late to solve the problem. Fred, upon learning this, then advised his father who relayed the information to Petitioner, that Nancy was only thirteen or fourteen weeks pregnant. She was in fact twenty one weeks pregnant. Petitioner requested that Nancy see him on February 7th. On that day Nancy and Fred visited Petitioner's office, paid him $400.00, and after an all night vigil, Petitioner advised Fred that Nancy had suffered a heart attack, was in shock and had been taken to a hospital. Nancy was dead before she arrived at the hospital.

The police were notified and a portion of fetus was removed from the uterus of the body. A detective, without benefit of a search warrant and in the Petitioner's absence, searched his office and surrounding area and seized from his trash can a part of a fetus. When questioned, Petitioner advised the Coroner he had treated Nancy for chest pains, nervousness and a possible cardiac condition. The pathologist testified as to the pregnancy that the uterus had been evacuated in an unusual fashion and had been perforated, which led to hemorrhaging and ultimately to death from shock.

The defense evidence was that the phone calls from Ed Landreth took place and that Petitioner did agree to examine Nancy. He did so, and finding her to be over four and one half months pregnant, advised her that the pregnancy could not be terminated. Nancy stated that this would "kill her father" and threatened suicide. Later that night, Nancy and Fred returned to his office. She was hysterical and had apparently attempted to abort herself. Petitioner then sterilized the area, removed the protruding placenta and fetus, gave her medication and performed a curettement. Nancy continued to digress and died before she could be taken to a hospital. There was

other expert evidence that the Petitioner had rendered proper treatment under those circumstances.

Prior to trial, Petitioner filed a motion to dismiss the indictment for the reason that *Section 559.100* was "unreasonable, discriminatory, invalid and unconstitutional" and violated due process, equal protection and the right of privacy (Tr. 4-5). Upon appeal, the Petitioner raised the point that the statute violated due process because it was unreasonable, discriminatory, vague and indefinite and violative of the right of privacy. The Supreme Court of Missouri held that "the posture of appellant's case does not present nor involve issues entitling him to a determination of his alleged constitutional question." (Opinion p. 9).

(f) ARGUMENT

The federal constitutional question was raised at the very onset of the case and preserved upon appeal. Yet the Supreme Court of Missouri, upon appeal, held that the Petitioner was not in a position to attack the constitutionality of the statute because, although the State's evidence was that he had committed the abortion, Petitioner claimed only that he had "cleaned up" after a partial abortion and therefore his defense did not go to the statutory exception of "unless the same is necessary to preserve her life."

The difficulty with the position of the Missouri Supreme Court is that Petitioner's attack went to the statute itself, that the exception "necessary to preserve life" did not set up constitutional standards, that abortion laws themselves are unconstitutional, that this one in particular is unconstitutionally vague and indefinite, and that since the statute was unconstitutional his conviction under it could not stand.

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Abortion laws, which are generally similar to the Missouri statute, have been under wide and varied attack in recent years. The Supreme Court of California in *People v. Belous,* (Cal. 1969) 458 P.2d 194, held the California statute unconstitutional because the term "necessary to preserve" was not capable of sufficient meaning to satisfy due process requirements. This Court recently refused to overturn this decision upon appeal by the State. (*Order entered February 24, 1970.*) The United States District Court for the District of Columbia in *United States* v. *Vuitch* (decided November 10, 1969), in finding a similar law unconstitutionally vague, also pointed out that such laws infringe upon a "woman's right to avoid childbirth for any reason," invaded the right of privacy, interfered with the proper practice of medicine, and denied due process by assuming guilt on the part of a physician whose professional judgment should not be challenged. The United States District Court for the Eastern District of Wisconsin in *Babbitz* v. *McCann* (decided March 5, 1970) held the Wisconsin abortion law unconstitutional under the *Ninth Amendment* because it is the decision of the mother and not of the state as to whether to abort an unquickened fetus, and that the state, whose duty and power goes to the protection of people and property, does not have sufficient legitimate interest to prohibit the abortion of an unquickened fetus which is not a person, but is but a part of the consenting mother.

This Court in *Griswold* v. *Connecticut,* 351 U.S. 479, 14 L.ed.2d 510, 85 S.Ct. 1678, held that the practices of and in the bedroom are free from examination by the state. Petitioner believes that if a law prohibiting contraceptives is an unconstitutional invasion of privacy, then a law that prohibits the abortion of an unquickened fetus is likewise unconstitutional. It is just a matter of timing.

On the other-side-of-the-coin, the Supreme Court of New Jersey, likewise confronted by a similar statute, upheld it against the void for vagueness attack in *State* v. *Moretti*, (N.J. 1968) 244 A.2d 499.

The Petitioner's cause thus involves a federal question of substance not heretofore determined by this Court, but upon which the lower courts are increasingly being confronted and upon which these same lower courts seem to be thrashing about in a sea of discord and confusion. With the changing morals of our ever expanding society, the "problem" confronting Nancy Ward is becoming more and more the rule instead of the exception. Should Nancy and girls in her position be confronted with a problem with only two legal answers, shotgun wedding or a life of shame. Or should a third alternative be available—legal abortion under professional care. By what right does a state interfere with her freedom of choice to be a mother or not to be. Some states, including Kansas, have repealed or modified their abortion laws so as to grant girls like Nancy that third alternative. All agree the question presented here is a vital and moving social problem involving the very heart of a prospective mother and her physician. If these statutes are constitutional, then this Court should say so. If they are not, then a decision by this Court should once and for all say so and relieve girls like Nancy, boys like Fred, and doctors like Petitioner from the agony of indecision.

Finally, let us look at *Section 559.100* and examine it more closely. This statute, like all these others, use the exception "unless the same is necessary to preserve her life or that of an unborn child." Only a doctor can determine when an abortion is necessary to preserve the mother's life, yet a jury or judge is allowed to make this determination under this statute. Even doctors disagree.

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What is necessary in one case may not be necessary in another. If an abortion is performed and the mother lives, can anyone with any degree of accuracy say that the abortion actually saved her life, or would she have lived anyway. Medical science is not that exact. Also, how can an abortion preserve the life of an unborn child. If the meaning of abortion covers a situation where the child can live, it would appear that caesarean and breach births are prohibited. If necessary to preserve life means only where it is absolutely required in order to prevent death, then a doctor, in assisting a woman having a miscarriage violates this statute. For each of these operations involves the use of drugs, medicines and instruments, the use of which is prohibited by *Section 559.100*.

The exception in *559.100* is in two parts. First, where it is actually necessary to preserve life, and second, if the abortion is performed by a person who is not a licensed physician, then it is not illegal if the abortion "has been advised by a duly licensed physician to be necessary for such a purpose" whether it is in fact necessary to preserve life or not. Here, the Petitioner, who is a licensed physician, was required to be correct in his analysis that it was necessary to preserve life (regardless of his medical judgement) but as to persons who are not doctors, the standard is not so exact. Double standard—denial of equal protection. A layman is much better off than the professional.

Finally, the statute makes the aborter guilty of manslaughter if, at any time after the abortion "being thereby occasioned" the woman dies. Whether the occasion refers to the death of a quick child, or to the event of her own death, or to the occasion of the abortion, is not clear. But even assuming it refers to the "occasion of the abortion", it would appear that the Petitioner would be guilty of man-

slaughter if Nancy Ward, in leaving his office was struck and killed by an automobile outside his door, or if her enraged father had entered during the abortion and had shot her. Due process certainly requires some type of causal connection between the prohibited act and the death.

As was held in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 83 L.ed. 888, 59 S.Ct. 618, no one should be required at peril of life, liberty and property to speculate as to the meaning of penal statutes.

CONCLUSION

Petitioner respectfully submits that his Petition for Writ of Certiorari to the Supreme Court of Missouri should be granted and that this Court should hold that *Section 559.100, R.S.Mo., 1959* is repugnant to the Constitution of the United States and that the Petitioner should be discharged.

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APPLICATION FOR RECONSIDERATION OF APPLICATION FOR RELEASE ON BAIL PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner and moves this Honorable Court, or a Justice thereof, for an order under the authority of *Rules of the Supreme Court, Rule 27, Title 28, United States Code,* reconsidering the Petitioner's previous application for release on bail pending disposition of petition for Writ of Certiorari, and order Petitioner's release upon such reasonable bail, and in support thereof, states:

1. That on or about January 23, 1970, Petitioner filed herein his Application for Bail Pending Certiorari which was hurriedly drawn and filed in an effort to allow the Petitioner free on bond.

2. That thereafter, and on the 30th day of January, 1970, Mr. Justice White denied said application.

3. That thereafter said application was referred to the Court, and was on the 27th day of February, 1970, denied.

4. That Petitioner would refer the Court to and incorporate herein the statements, arguments and allegations contained in his Petition for Writ of Certiorari to the Supreme Court of the United States, to which this Application is appended.

5. That the Petitioner is a duly licensed osteopathic physician with property and assets and is not likely to abscond or fail to appear when ordered.

6. That the Petitioner was at all times prior to the affirmance of his conviction by the Supreme Court of Missouri free on bond and that thereafter Petitioner, in com-

pliance with the mandate, surrendered himself into custody.

7. That the Petitioner is now in custody.

8. That Petitioner would urge the Court to reconsider its previous denial of bail in light of the presentation made in the Petition for Writ of Certiorari now presented to the Court.

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